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No. 91-1855

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

ALVIN D. PEARSON, BRENDA CURTIS and CENTURY 21 PEARSON, INC. REALTORS®, an Illinois corporation,

Petitioners,

v.

JAMES EDGAR, as Governor of the State of Illinois, and ROLAND W. BURRIS, as Attorney General of the State of Illinois,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITIONERS' REPLY BRIEF

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ARGUMENT

I.

THE STATE, SUPPORTED BY THE COURTS BELOW, SILENCES FAR MORE SPEECH THAN THE ILLINOIS LEGISLATURE ACTUALLY PROHIBITED.

The Court should grant this Petition because the decision below would deprive commercial speakers of due process protection by shifting to speakers the onus of resolving statutory vagueness by ceasing all future communication, rather than just that speech which the legislature actually prohibited.

The Illinois General Assembly imposed severe criminal penalties only on brokers who "solicit residents to list or sell" their homes after notice to the brokers. *Ill. Rev. Stat.* ch. 38, ¶70-51(d) (the "Anti-solicitation law" or the "Statute"). Lacking clear statutory definition of the prohibited conduct, however, prosecutors have charged violations against brokers whose goodwill advertising made no effort to persuade or induce residents to list or sell. (*See, e.g.*, R-80, Exs. 8b, 8c.) Even when state judges dismissed those prosecutions because the advertising in question was not "solicitation" (*id.*, Ex. 8 at ¶¶5-7), the State contends in its Opposition Brief that such advertising "reasonably could be construed as solicitations for the sale or listing of homes." (Opp. Br.[1] at 3-4, 9.) The State thus asserts a policy of "nonacquiescence" under which it may prosecute a broker for virtually any communication with

[1] Petitioners cite their Petition For Writ Of Certiorari as "Pet. at ____," and Respondents' Brief in Opposition as "Opp. Br. at ____."

residents, including advertisements previously ruled outside the scope of the Anti-solicitation law by a state judge. If brokers find this situation uncertain, the State says, they may resolve "any concerns" by "refrain[ing] from future communications to the named addressees." (*Id.* at 3-4, 8, citing *Curtis v. Thompson*, 840 F.2d 1291, 1304 n.12 (7th Cir. 1988).)

The Illinois legislature, however, did not forbid *all* "future communication" between brokers and residents. Hence the Statute provides no warning to brokers, for example, that they may be imprisoned for distributing goodwill advertising or for advertising a house that *already* is for sale. Moreover, the Court of Appeals' attempt to "cure" this defect by judicially expanding the Statute's reach further conflicts with this Court's due process jurisprudence. *E.g.*, *Pierce v. United States*, 314 U.S. 306, 311 (1941).

II.

NEITHER INTEREST ASSERTED BY THE STATE JUSTIFIES SILENCING PETITIONERS' SPEECH.

The State's First Amendment defense simultaneously invokes two interests—prevention of "unethical real estate practices" and protection of residential privacy—not because both support the Anti-solicitation law, but because neither does so. The Court should grant this Petition because the illusory justifications proffered by the State and embraced by the courts below would permit government to silence any disfavored group of speakers.

A. The Anti-Solicitation Statute Criminalizes A Vast Amount Of Real Estate Advertising That Otherwise Is Entirely Ethical.

The State contends its Anti-solicitation law combats "unethical real estate practices such as blockbusting and

panic peddling" by "unethical realtors (sic)[2]." (Opp. Br. at 4, 10.) Any implication that Petitioners engaged in "unethical practices," however, is completely unwarranted. Petitioner Pearson's peers have recognized him as an industry leader in equal opportunity matters. (*See* Pet. at 3.) Petitioners were not charged with violating any of the state or federal laws that directly prohibit blockbusting and similar activities. *See* 42 U.S.C. §3604; *Ill. Rev. Stat.* ch. 38, ¶70-51(a-c). The advertising technique that triggered Petitioners' prosecutions—telephone calls advertising their services—is employed untold millions of times each day by thousands of businesses in myriad industries. The sole reason the State sought to imprison these Petitioners is that they were black brokers seeking business in a predominantly white community. Hence the facts of this case conclusively prove the Statute sweeps far more broadly than would be necessary to combat "unethical" practices. (These facts, however, are among those that the courts below refused to consider. (*See* Pet. 8-10, 18-19.))

Indeed, the State conceded below that no reasonable fit exists between its interest in preventing unethical real estate practices and the Anti-solicitation law. Unlike other paragraphs of the same statute which directly prohibit blockbusting and similar discriminatory conduct (*Ill. Rev. Stat.* ch. 38, ¶70-51(a-c)), the Anti-solicitation law "does not limit [its scope] to solicitations made on a discriminatory basis." Therefore, the State argued by "implication," the legislature must have had a different purpose in mind: *i.e.*, privacy. (Brief of Defendants-Appellees, App. No. 89-3248, pp. 37-38.) Perceiving the futility of that argument, of course, the State now acknowledges that privacy became a "purpose" of the Statute only "in recent times."

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[2] The term "Realtor®" is a registered trademark of the National Association of Realtors®.

(Opp. Br. at 10.) The State's concomitant revival of the Statute's purported anti-discrimination purpose is notable principally for its implicit acknowledgement that privacy also fails to sustain the Statute.

B. The State's Illusory Comparison To *Rowan v. Post Office Dept.* Would Permit Government To Silence Any Disfavored Group.

The State's glib assertion that an interest in protecting residential privacy justifies the Anti-solicitation law (Opp. Br. at 7-8) illustrates the danger created by the lower courts' unquestioning acceptance of this assertion. The State never explains how advertising distributed at a shopping mall, for example, might disturb residential privacy, or why a phone call from a real estate broker invades a resident's privacy but a call from a long distance telephone carrier, for example, does not do so. If the lower courts' failure to require such explanations were not error, then a purported "privacy interest" would become a universal justification for governmental restrictions on commercial speech. "Privacy" also would camouflage any insufficient purpose that actually motivated the restriction, as the State's desire to influence racial forces in the real estate market concededly did in this case. Hence, while protection of residential privacy unquestionably is a substantial interest in the abstract, its uncritical acceptance in this case creates a dangerously expansive precedent that this Court should reverse.

This Court's decisions (including those relied on by the State) reflect the careful analysis needed to harmonize legitimate governmental concern for privacy with First Amendment protections. Thus, rather than provide "strong support" for the State's position (Opp. Br. at 8), *Frisby v. Schultz*, 487 U.S. 474 (1988), instead highlights a glaring

flaw in the Court of Appeals' privacy rationale: a restriction on generally directed written or telephone communications provides only remote and ineffective protection of residential privacy. This Court distinguished the focused picketing at issue in *Frisby* as "fundamentally different from more generally directed means of communication," including solicitation and handbilling. 487 U.S. at 486. The Court identified two fundamental differences: (1) solicitation communicates information to the public, not to specific households; and (2) unlike solicitation, picketing "inherently and offensively intrudes on residential privacy." *Id. See Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 564 (1980) (a regulation that provides only remote and ineffective protection does not directly advance the state interest involved, and thus may not be sustained).

Other decisions by this Court also recognize the minimal intrusion created by communications—such as mailings and phone calls—that residents readily may disregard. *See, e.g., Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 642 (1985) ("[a]lthough some sensitive souls may have found appellant's [written] advertisement in poor taste, it can hardly be said to have invaded the privacy of those who read it"); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 72 (1983) (a mailing does not hold residents "captive" in their homes because they are free to avert their eyes and throw away the mailing); *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 542 (1980) (same); *see also Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 475-76 (1988) (extending *Zauderer* to targeted mailings in part because neither targeted nor generally directed mailings invade the recipient's privacy). Despite these precedents, the State points to no characteristic of real estate advertising that warrants singling out such speech for special restriction.

The courts below excused this deficiency in the State's rationale by an unprecedented extension of *Rowan v. Post Office Dept.*, 397 U.S. 728 (1970). Although the content-neutrality of the statute at issue in *Rowan* was central to the Court's decision to uphold the statute, 397 U.S. at 735-737 & N.4, the courts below extended *Rowan* to uphold discrimination among speakers based on viewpoint. This Court has warned, however, that "[w]hen a State attempts the extraordinary measure of punishing truthful publication in the name of privacy, it must demonstrate its commitment to advancing this interest by applying its prohibition even-handedly . . . ." *The Florida Star v. B.J.F.*, 491 U.S. 524, 540 (1989).

Rather than demonstrating an even-handed commitment to privacy, the State cites the "unreceptive addressee" to justify its discriminatory treatment of real estate brokers' speech. (Opp. Br. at 11-12.) As noted in our Petition, this justification is illusory because the mere requirement that residents must opt into the State's discriminatory scheme does not make the scheme less discriminatory. (Pet. at 17-18.) In addition, residents who opt into the State's discriminatory scheme may in fact be willing to receive some of the advertising the State prohibits. The notice to brokers required by the Statute says the resident "does not desire to sell [his or her] property." *Ill. Rev. Stat.* ch. 38, ¶70-51(d). A resident who does not wish to sell nevertheless may wish to learn of available homes nearby. With this information, the resident can, in the words of Petitioners' own advertising, "pick [his] neighbor" by informing friends and relatives. (*E.g.*, R-80, Ex. 1J.) Advertising that provides such information not only is entirely "ethical," but it builds stronger communities as well. The Statute, however, fails to warn residents that the State will silence such advertising together with solicitations to sell, so the law's vagueness undermines the very notion

that it protects "unwilling listeners." (This is another fact the lower courts refused to consider.)

Finally, the courts below also refused to consider uncontroverted evidence that the Anti-solicitation law prevents brokers from reaching many residents who resist requests by community groups and elected officials to sign Anti-solicitation notices. The Statute's unclear scope and draconian penalties drive brokers from some communities altogether. (*E.g.*, R-80, Ex. 1, ¶¶17-19, Ex. 4, ¶6.) In addition, a few participants in the Anti-solicitation scheme may effectively render an entire mass or bulk mail zone beyond the reach of brokers by these highly effective media. (*E.g.*, *Id.* at Ex. 4, ¶12.)

C. Significant Differences Distinguish Illinois' Anti-Solicitation Statute From The Ordinances At Issue In The *South Suburban Housing Center Case.*

The State's effort to treat this case "collectively" with *South Suburban Housing Center v. Greater South Suburban Board of Realtors®, et al.*, 935 F.2d 868 (7th Cir. 1991), *cert. denied*, ____ U.S. ____, 112 S.Ct. 971 (1992) ("*South Suburban*"), obscures important differences between the Statute at issue here and the municipal ordinances at issue in *South Suburban*. The Court of Appeals described these differences as follows:

> One difference between the ordinances of the four municipalities and the state statute is that the municipal ordinances call for the city or village not only to compile but also to publish the non-solicitation list. The other differences are that the municipal ordinances are more limited in that they specifically define "solicit or solicitation," restrict their application to types of contacts that occur in the home or a residence and provide for fines only.

South Suburban, 935 F.2d at 876.

Each of these differences is important. The Statute's failure to require publication of notices permits selective enforcement of the Statute against brokers, like Petitioners in this case, who provoke the ire of a community group by seeking housing for black customers in a predominantly white neighborhood. The Statute's failure to define "solicit or solicitation" obviously exacerbates its vagueness. The Statute's application to speech that occurs anywhere in Illinois enfeebles the State's reliance on an interest in residential privacy. Finally, the Statute's severe criminal penalties increase the unfairness created by its vagueness.

III.

THE COURTS BELOW NEVER REQUIRED THE STATE TO MEET ITS CONSTITUTIONAL BURDEN IN THIS CASE.

The State bears the burden to justify its restriction on Petitioners' protected speech. *E.g.*, *Zauderer*, 471 U.S. at 641. As the State's Opposition Brief acknowledges, the Courts below never held the State to this burden. (Opp. Br. at 13.) To the contrary, the lower courts' first review of Petitioners' challenge occurred on Petitioners' motion for preliminary injunction; Petitioners then bore the heavy burden imposed by *Brunswick Corp. v. Jones*, 784 F.2d 271, 273-74 (7th Cir. 1986). *Curtis*, 840 F.2d at 1296. (Tellingly, the District Court simultaneously *denied* the State's motion to dismiss Petitioners' action for failure to state a claim. (App. at 48-49.)) On remand following denial of Petitioners' motion for preliminary injunction, the lower courts imposed on Petitioners the "burden to prove that *Curtis* should not be the law of the case." (Opp. Br. at 13.) *Contra*, *University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981).

Hence the State never faced its constitutional burden to justify the restrictions imposed on Petitioners' speech. Particularly when coupled with the lower courts' refusal to consider the facts of the case (Pet., pp. 18-19), the peculiar procedure below inflicted on Petitioners an injury of constitutional significance. Although Petitioners believe the substantive issues raised by the decision below warrant reversal on the merits, Petitioners respectfully suggest a remand for consideration of the factual record in light of the correct legal standards and constitutional burden is the minimum alternative action needed to restore fairness to Illinois' treatment of Petitioners and other real estate professionals.

CONCLUSION

For the foregoing reasons, the Petition For Writ Of Certiorari To The Seventh Circuit Court Of Appeals should be granted.

Respectfully submitted,

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